Supreme Court, U.S.
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No. 80-123

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,
*Cross Petitioner,*

*v.*

JOHN SALORIO, ROBERT COE and JOHN D. McGARR, JR.,
*Cross Respondents.*

**On Cross Petition for Writ of Certiorari to the Supreme Court of New Jersey**

## BRIEF FOR CROSS RESPONDENTS JOHN SALORIO, ROBERT COE AND JOHN D. McGARR, JR. IN OPPOSITION TO CROSS PETITION FOR A WRIT OF CERTIORARI

MAX GITTER,
345 Park Avenue,
New York, New York 10154.
(212) 644-8000

ADRIAN M. FOLEY, JR.,
Gateway I,
Newark, New Jersey 07102.
(201) 643-2060

*Counsel for Cross Respondents*

*Of Counsel:*

SUZANNE LAST STONE,
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON,
New York, New York.

KEVIN J. COAKLEY,
CONNELL, FOLEY & GEISER,
Newark, New Jersey.

August 20, 1980

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

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## CROSS RESPONDENTS' BRIEF IN OPPOSITION

### Counterstatement of the Case

This action was brought by cross respondents in June 1977 to declare unconstitutional the New Jersey Emergency Transportation Tax, also known as the Commuter Income Tax, 54 N.J. Stat. Ann. §§ 8A-1—8A-57 (West) (Supp. 1979), on the grounds that the tax is repugnant to the Privileges and Immunities and Equal Protection Clauses of the Constitution of the United States.

Both parties seek review of the New Jersey Supreme Court's judgment in this case, entered March 26, 1980. In our appeal, No. 79-2026, we set forth the underlying facts concerning the history of this litigation and the structure and operation of the Commuter Income Tax. We confine ourselves here to a brief rendering of the factual background of the claim New Jersey presses in this cross petition—that an "agreement" allegedly struck by the Governors of New York and New Jersey in 1962 to respect each other's taxing schemes, suffices to make an unconstitutional tax constitutional and estops cross respondents from challenging the tax. The background facts—or, more precisely, the absence of facts—make clear why the cross petition does not present issues worthy of this Court's review.

There was *no* document even purporting to be an agreement between the Governors of New York and New Jersey in the record of this case (or anywhere else, for that matter). The "agreement" relied on by cross petitioner is nothing but a press release issued by then Governors Rockefeller and Hughes—which cross petitioner dubbed an "executive accord." The press release is quoted in

full in the opinion of the New Jersey Superior Court (App. A, pp. 44a-45a).* We respectfully direct this Court's attention to that document, since it is obvious from the document's face that there is no agreement and that cross petitioner's claim is frivolous.

There was *no* reciprocal tax legislation by New York or New Jersey. The enactments of the New York and New Jersey legislatures now relied on by cross petitioner are nothing but separate tax legislation, undertaken spontaneously and without concert—which cross petitioner dubbed "reciprocal legislative action." The legislatures of New York and New Jersey, moreover, acted long before the date of the alleged "agreement". Cross petitioner's statement that the tax is imposed and collected pursuant to the purported agreement (Cross Petition, p. 9) is wrong and without any foundation in fact, since the tax was enacted on May 19, 1961—nearly a year before the May 6, 1962 date of the press release.

There was *no* claim concerning an "agreement" between the governors of the two states raised with any seriousness in the proceedings below. Such claim as cross petitioner made was nothing but an afterthought. Although cross petitioner submitted voluminous evidence regarding the tax during the extensive pretrial proceedings in this case, not once during that time did the cross petitioner allude to an agreement between the Governors of New York and New Jersey concerning the tax. Cross petitioner's contention that an agreement existed between the two states first appeared in New Jersey's brief to the trial court—and even then, New Jersey raised the press release solely to bolster its motion to dismiss the action

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* This notation refers to the Appendix filed with our appeal to this Court (No. 79-2026).

on the ground that New York State was the "real party-in-interest."* It was not until February 17, 1978, that New Jersey thought to argue—in a *reply* memorandum to the trial court—that a press release was sufficient to estop the plaintiff from challenging the constitutional defects of the New Jersey Commuter Income Tax.

There was *no* resolution by the court below of the threshold factual question on which the cross petition is predicated: whether any agreement of any kind between New York and New Jersey exists. The New Jersey trial court found that there was an "accord" between the two states and ruled that this accord, without more, was sufficient to take the tax entirely out of the ambit of *Austin* v. *New Hampshire*, 420 U.S. 656 (1975) (App. B, p. 56a). On appeal to the New Jersey Supreme Court, cross respondents challenged that finding of an "accord" as clearly erroneous. The New Jersey Supreme Court specifically noted that there was a question whether any "agreement" even existed: "The parties disagreed over the legal effect to be given the *alleged* 'accord' . . ." (App. A, p. 27a) (emphasis added). The New Jersey Supreme Court chose not to reach that factual question; it did not affirm the finding of the lower court, nor did it remand this question to the trial court. Instead, the court ruled that there was, in any event, no enforceable agreement between the two states because Congress did not approve any agreement (App. A, p. 30a), and because the New Jersey Commuter Income Tax must "independently pass muster under the Privileges and Immunities Clause." (App. A, p. 31a).

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* New Jersey argued that Governor Rockefeller's participation, as evidenced by the press release, made the State of New York the proper party in this action—even though New Jersey had previously argued—and this Court had held—that New York had no standing to sue. *See New York* v. *New Jersey*, 429 U.S. 810 (1976).

## Summary of Argument

The Questions Presented by the cross petitioner presuppose that an agreement was entered into by the States of New York and New Jersey. But the record shows conclusively that there is no agreement. Thus, the "Questions Presented" by the cross petitioner are hypothetical questions.

The alleged agreement would not, in any event, be legally enforceable even if it did exist. The "agreement" does not comply with the requirements of the Compact Clause even though the agreement, as cross petitioner describes it, would grant one state the right to impinge on another state's power to regulate the tax liabilities of its own citizens. The agreement does not comply with the requirements of the Compact Clause even though the alleged purpose of the agreement would be to enforce a tax that is challenged as repugnant under the Privileges and Immunities Clause—a challenge that necessarily implicates essential federalism principles.

The agreement is wholly irrelevant to whether the New Jersey tax statute is repugnant under the Privileges and Immunities Clause. An agreement of whatever form between states is itself subject to the Privileges and Immunities Clause. Moreover, no agreement can affect taxpayers' individual right under the Privileges and Immunities Clause to be free from discriminatory taxation.

## *REASONS WHY THE WRIT SHOULD BE DENIED*

### POINT I

**Cross Petitioner's Claim Based on an "Agreement" Between New York and New Jersey Is Not Worthy of Review.**

Cross petitioner's claim based on a purported agreement between New York and New Jersey raises no issue worthy of review by this Court for the following reasons:

1. The facts of record do not permit the formulation of the "Questions Presented" by the cross petitioner.

(a) The facts of record show conclusively that there was *no* agreement between New York and New Jersey. Although the press release mentions an "understanding" between the Governors of New York and New Jersey, it is obvious from the face of the press release that it is not itself an agreement. No actual agreement was ever entered into and no agreement was introduced into evidence.

The record does contain one actual agreement between the States of New York and New Jersey (Pa139-142). That agreement relates to tax withholding procedures—a matter irrelevant to any issue in this case. The document in which that agreement is embodied was signed by the respective tax officials of the two States; it contains a series of "whereas" clauses setting forth the reasons for an agreement; and it explicitly declares, "It is hereby agreed." That document demonstrates conclusively that when the States of New York and New Jersey wished

to create a contract concerning taxes, they knew how to do so.*

Cross petitioner took a press release and named it, in turn, an "executive accord," an "agreement," an "arrangement," and a "reciprocal understanding." No amount of rechristening, however, will alter basic principles of contract law. The paper remains a press release, not worth this Court's attention.

(b) In the absence of assurance from the record that an agreement even existed between New York and New Jersey, the "Questions Presented" in the cross petition pose nothing more than a hypothetical question. Indeed, since the record conclusively shows that there was no agreement, cross petitioner's Questions can be resolved only by rendering an impermissible advisory opinion. Accordingly, this Court should not grant certiorari.

2. The New Jersey Supreme Court's determination that, in any event, there was no legally enforceable agreement is consistent with this Court's recent decision in *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978), and presents no issue worthy of review.

(a) An agreement by New York purporting to give New Jersey the right to "enforce" and thereby perpetuate the tax laws of New York State would be a delegation of New

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* Since cross petitioner obviously takes the position that any action, no matter how informal, can constitute a tax "accord" of great significance, no formal action should be necessary to rescind such an "accord". Therefore, as an *a fortiori* matter, on cross petitioner's theory any "accord" relied upon by cross petitioner was surely nullified long before the commencement of this lawsuit by New York's institution of litigation challenging the validity of New Jersey's taxation of its citizens, which culminated in this Court's decision in *New York* v. *New Jersey*, 429 U.S. 810 (1976).

York's sovereign power to regulate the tax liabilities of its own citizens and to rescind its own legislation. As the New Jersey Supreme Court rightly determined, such relinquishment of sovereign power by one state to another state would encroach on principles of federalism. Under established rule, affirmed in *Multistate,* any agreement threatening the federal structure must comply with the strictures of the Compact Clause. 434 U.S. at 471.*

(b) The concessions in New Jersey's own petition suffice to show that the alleged agreement would be invalid under the Compact Clause.

Cross petitioner concedes:

—The Privileges and Immunities Clause of the Constitution is designed in part to maintain the structural balance essential to the concept of federalism (Cross Petition, p. 10).

—The strictures of the Compact Clause of the Constitution apply to any agreement that *may* encroach upon the supremacy of the United States (Cross Petition, p. 8).

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* New Jersey is hoisted with its own petard. It created an "agreement" out of whole cloth by ascribing solemn characteristics to a press release. It then proceeded to attribute powers to this "agreement" that far surpass even the powers actually granted by the states in the agreement scrutinized in *Multistate.*

Unlike the situation posited by the "agreement" alleged here, no state that was a party to the Multistate Tax Compact relinquished any of its sovereign power. The Commission created by the state had the power to adopt only advisory regulations that would have "no force in any member State until adopted by that State in accordance with its own law." 434 U.S. at 457. Individual states retained *"complete control over all legislation and administrative action"* affecting tax liabilities. *Id.* (Emphasis added.)

—The strictures of the Compact Clause were not complied with since Congress did not consent to the alleged agreement (Cross Petition, p. 8).

These concessions fully dispose of the cross petition's claim, since it obviously follows that (1) a tax challenged as repugnant under the Privileges and Immunities Clause implicates the structural balance essential to the concept of federalism (*Austin* v. *New Hampshire,* 420 U.S. at 662); (2) an agreement to respect or enforce a tax challenged as repugnant to the Privileges and Immunities Clause would implicate "our federal structure" (*United States Steel Corp.* v. *Multistate Tax Commissioner,* 434 U.S. at 478); and (3) any agreement that would "touch on constitutional strictures" or "alter our federal structure" must satisfy the strictures of the Compact Clause (*Id.*).

Thus the purported agreement, even if it existed (which it does not), would be legally unenforceable.

3. The New Jersey Supreme Court's determination that the agreement is irrelevant to the inquiry whether the tax is unconstitutional under the Privileges and Immunities Clause is consistent with recent decisions of this Court and presents no issue worthy of review.

(a) This Court explicitly stated in *Multistate* that any agreement of whatever form between states is itself subject to the limitations of the Privileges and Immunities Clause. 434 U.S. at 478 (citing *Austin*). Cross petitioner fails to recognize this basic point: what one state cannot do alone by means of legislation, two states cannot do together by "agreement." An agreement which, on cross petitioner's terms, would require New York to "respect and enforce" New Jersey's tax statute would be invalid unless the statute the agreement sought to enforce is

constitutional. As the New Jersey Supreme Court rightly determined, the Commuter Income Tax "must independently pass muster under the Privileges and Immunities Clause" (App. A, p. 31a). Thus, cross petitioner's claim adds nothing to the issues already presented by our appeal.

(b) No "agreement" between New York and New Jersey may stop taxpayers from asserting their individual rights under the Privileges and Immunities Clause. As this Court said in *Travis* v. *Yale & Towne Manufacturing Co.*, 252 U.S. 60 (1920):

> "A State may not barter away the right conferred upon its citizens by the Constitution of the United States to enjoy the privileges and immunities of citizens when they go into other States."

252 U.S. at 81. The Court in *Austin* quoted this language, terming it "fully applicable" in that case. Only agreements between states providing "reciprocably *favorable* treatment of nonresidents" are permissible. *Austin* v. *New Hampshire*, 420 U.S. at 667 n.12. An agreement to enforce a statute that would not grant favorable treatment to New York residents would not be an agreement providing "reciprocably *favorable* treatment of nonresidents."* And, as the New Jersey Supreme Court determined, there is no *favorable* treatment of New York residents by New Jersey here (App. A, p. 31a) since New Jersey imposes, at most, a 2½% tax on the income of New Jersey residents while it taxes New Yorkers at a rate of up to 15%.

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* The short answer to New Jersey's circular argument, made in a footnote at p. 11 of its cross petition, that the legislation at issue here is "favorable" or, at worst, "neutral", is found in this Court's decision in *Austin*. The New Jersey legislation is identical with the legislation struck down in *Austin* as not being "reciprocally favorable".

## CONCLUSION

**For the foregoing reasons, the cross petition for a writ of certiorari should not be granted.**

Respectfully submitted,

MAX GITTER
ADRIAN M. FOLEY, JR.
*Counsel for Cross Respondents*

*Of Counsel*:

SUZANNE LAST STONE
KEVIN J. COAKLEY

August 20, 1980